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IN THE

Supreme Court of the United States

October Term, 1961

No. 7

JOHN JOSEPH KILLIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

M. MICHAEL ESSIN,
623 North Second Street,
Milwaukee 3, Wisconsin,

DAVID B. ROTHSTEIN,
188 West Randolph Street,
Chicago 1, Illinois,

BASIL R. POLLITT,
52 Sidney Place,
Brooklyn 1, New York,

Attorneys for Petitioner.

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I. The issues raised by the government's destruction of and refusal to produce documents.

Less than two weeks before oral argument the Solicitor General informs this Court and opposing counsel that the Department of Justice caused both the trial court and the Court of Appeals to rule on the producibility of the statements of Ondrejka and Sullivan believing that all these statements existed and contained only a schedule of dates and amounts of the payment they had received as informers.[1]

[1] At the trial the government counsel represented that the statements in question existed as "administrative parts of the bookkeeping and files and records of the Administrative Office of the Federal Bureau of Investigation which Administrative records are as important to the Federal Bureau of Investigation in the setting up of many of its matters, including the matters of its budget and expenses and costs of operation, as are any of the other of its administrative documents and files" (tr. 550-551). He further indicated to the trial court that these statements did not itemize the "expenses" of the witness (tr. 551).

[Continued on page 2]

In point of fact, we are now told, Ondrejka's statements were made orally to F.B.I. agents who made "hand written notes of the amounts spent by Ondrejka for expenses which they transcribed to the receipts later signed by Ondrejka when he received reimbursement. The *personal* notes were destroyed immediately in the normal course of operation" (Government Brief, p. 24, emphasis supplied). The reports compiled on the basis of these notes and signed by the witnesses are in existence, and contain information in addition to the dates and amounts of payment.

We are less than impressed by the present candor of the Department of Justice. We note for instance that the Department does not tell us if Sullivan's reports were made and receipts signed in the same way as were Ondrejka's, and, if so, whether by some happy chance his agents' "personal" notes were not destroyed and are available. We are not told if the "normal" course of operation in which the notes were destroyed was one prescribed by the Department of Justice by rule or established practice, or was left as a matter of policy to the agent's discretion (or his superior's). We are not sure whether the notes of the oral reports were identical with the signed receipts or how they differed. We are not even told when the true facts became known. By the very nature of the relevant information it is solely within the Department's possession. We submit that the Department of Justice, for whatever reason, has not sustained the burden of complete candor which the facts here throw upon it.

[Continued from page 1]

In its brief before the Court of Appeals, the Department of Justice clearly inferred that these statements existed, complaining that to require production of the statements would be "difficult, time consuming, and wholly unnecessary" (Government Brief, p. 41), and that there would be no way to excise irrelevant matter (Government Supplemental Brief, p. 6). The Department of Justice also represented that "The actual receipts do not contain a schedule of the purposes for which the reimbursement was made but merely the total which was paid" (Government Brief, p. 21 fn. 14).

The Department of Justice's frankness would be more impressive if it did not proceed to argue therefrom that petitioner should be left remediless, even though he has been deprived by the Department's own action of rights which this Court and Congress has deemed appropriate to a fair trial. As we show in the succeeding pages the Department of Justice is mistaken; these rights are not meaningless; the law does provide meaningful remedies to secure the protection of a defendant's rights.

A. The destruction of the agents' notes irretrievably deprives defendant of due process of law and his rights under Title 18 U. S. C. Section 3500. The proceeding should be dismissed.

It is fundamental to the concept of fairness in any society that a police agency, preparing a case for prosecution has no right to suppress or destroy evidence. *Mooney* v. *Holohan*, 294 U. S. 103, *Napue* v. *Illinois*, 360 U. S. 264, *Pyle* v. *Kansas*, 317 U. S. 213. The sinister potentials in such a practice are plain, *e.g.*, *United States ex rel. Thompson* v. *Dye* (3 Cir. 1955), 221 F. 2d 763, *cert. denied*, 350 U. S. 875; *United States ex rel. Montgomery* v. *Ragen* (N. D. Ill., 1949), 86 F. Supp. 382. Even when malice cannot be shown, the fact is that a police agency is least able to determine which evidence will be deemed useful for the defense and which will not. A prosecutor may not decide for the Court what is admissible, or for the defense what is useful. *Griffin* v. *United States* (D. C. Cir., 1950), 183 F. 2d 990, 992-3. The right to counsel means that decision as to the use the defense wishes to make of evidence is the prerogative of the defense, *Jencks* v. *United States*, 353 U. S. 657, 668-669. The usurpation of that right by the police is a denial of a fair trial.

The Department of Justice cannot argue that the agents' notes which it destroyed were not producible at trial for use by the defense. The notes would have been producible under subpoena. (In the argument of *Palermo*

v. *United States*, 360 U. S. 343, the government conceded that a defendant might examine the agent who had interviewed a witness, 360 U. S. at p. 362, fn. 1. The agents' notes, made in the regular course of business, would likewise be producible.) The government concedes (Government Brief, p. 23), that the agents' notes could also have come within the production requirements of Section 3500.

The government tells us that the agents' notes were destroyed "in the normal course of operation". We cannot ascertain from this ambiguous phrase whether the suppression of evidence was pursuant to a directive of the Department, or to a customary Departmental procedure. What the Solicitor General does disclose by this phrase is that the destruction was voluntary and the result of a common practice whereby the Department of Justice customarily destroys potential evidence while a criminal investigation is pending. Even when the suppression of evidence is negligent a conviction cannot be upheld. *United States* v. *Consolidated Laundries Corporation* (2 Cir., 1961), 291 F. 2d 563, *United States* v. *Heath* (D. Hawaii, 1957), 147 F. Supp. 877, *appeal dismissed* (9 Cir., 1958), 260 F. 2d 623. It does not matter therefore that the suppression of evidence here may not have been maliciously aimed at the individual defendant personally but, with majestic and indifferent impartiality, was execution of a policy which destroyed the rights of the whole class of defendants in federal criminal proceedings. The result is the same; the governing principle is the same. A police agency has no right to suppress potential evidence and deprive a defendant of its use, whether the suppression be done vengefully or indifferently.

The Department of Justice may argue, either directly or inferentially, that because the agents' notes were destroyed many years ago, prejudice to the petitioner cannot now be shown. Such an argument is unworthy. To hold that because the suppression has been complete, rather

than partial, it should be permitted to be successful, it is to make an absurdity of a defendants' rights and open the door to their destruction by artifice. The right is not illusory, it is fundamental and cannot be destroyed by sophistry or technicality. Moreover, a defendant's right to the production of statements under Section 3500 (or under preexisting law as declared by the *Jencks* decision[2]) does not depend upon a showing by him of their degree of materiality. Once the documents are shown to relate to the witness' direct testimony they are producible. When the agents' notes were destroyed the Department of Justice made it impossible for petitioner to secure his rights.

It should be noted that we are not dealing here with peripheral aspects of the problem. We are not concerned with the problem of some file clerk's lack of accuracy and care. Nor do we require that the government amass papers into eternity. We do maintain that while a criminal investigation is under way a police agency may not suppress or destroy potential evidence, at least until the investigation is completed.

The government described the agents' notes which were destroyed as "personal". We do not understand this usage. The notes were not "personal" in any meaningful sense. They did not deal with the personal affairs of the agents nor were they made in the course of some unofficial private investigation. They were made by a government agent, relating to government business, in the course of an official government investigation. Their making was a governmental act. Their destruction in the ordinary course of operation was also a governmental act which deprived defendant of his rights.

After two trials and two appeals, the Department of Justice now suggests that a hearing be held in the District

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[2] At petitioner's first trial, prior to the *Jencks* decision, petitioner had demanded production of the statements of the witnesess.

Court to determine whether or not the agents' notes were actually destroyed (Government Brief, p. 24). We see no point in such a hearing. If the agents involved have informed the Solicitor General that the notes were destroyed, we do not expect them to testify otherwise at a hearing. The sole result of such a hearing would be to establish a further factual basis for dismissal. Accordingly we accept the Solicitor General's representation that the notes were destroyed. Such destruction made it impossible for petitioner to secure his rights at trial. The only remedy is the dismissal of the proceeding.[3]

B. The failure of the trial court to require the production of the statements in the nature of receipts signed by the witnesses requires that a new trial be ordered.

After resisting production of the witnesses' statements in the District Court, the Court of Appeals, and on petition for certiorari here, the Department of Justice now requests that the question of the production of the receipts be returned to the District Court for determination, after an *in camera* inspection, whether a new trial should be ordered, this determination to be again subject to review by the Court of Appeals, and possible review by this Court. If for no other reason, practical considerations of the administration of justice make this cumbersome procedure improper. In the first place, conceded error in the jury instructions requires that a new trial be had in any event. Even were that not the case little time would be saved even in the District Court. The trial of this case took only six court days. The *in camera* determination by the District Court would involve, as the government points out

[3] If we did not deem the admission of the destruction of Ondrejka's statements to be sufficient for dismissal we shoud ask that the Department be required to state whether the record of Sullivan's oral statments were also destroyed. A close reading of the record (tr. 373-375) in the light of the Solicitor General's admission regarding Ondrejka's statements would indicate that Sullivan's oral reports were likewise recorded by the agents in their "personal" notes.

(Government Brief, p. 27), a reading and detailed analysis of a cold record of some 700 pages, and careful, analytical comparison of the presently unproduced statements (which are 124 in number) with that record and with the narrative statements of the two witnesses which the government did produce. If any scant amount of time would be saved over a new trial, it would not in any event compensate for the loss of the heightened possibilities for judgment and insight which the trial process affords.

Moreover the Department of Justice presents no valid reason why the trial judge might refuse to order a new trial. The petitioner made proper demand for the statements. The documents "relate to" the testimony of the witnesses. Their exclusion was not "harmless error." The statute grants to a defendant an unqualified right to production of this kind of document at his trial. The Department of Justice refused to accord the petitioner here that right and was erroneously upheld by the trial court and the Court of Appeals. (It did not even produce the documents for preliminary inspection by the trial judge so that a record might be made.) The only possible remedy for the Department's dereliction is a new trial.

1. *Proper demand was made for the documents in question.*

It ill becomes the Department of Justice which refused to produce the documents and distorted their contents, to claim that petitioner did not make proper demand for them. Petitioner moved, as the statute requires, for the statements of the witnesses at the end of their direct testimony (tr. 330, 455); the trial court ordered they be produced; the government agreed to produce them. The statute then placed the obligation upon the government to produce *all* the witnesses' statements (including the ones which it refused to produce). The government cannot now pass on to defense counsel the duty to call further attention to its own deliberate act of non-feasance or to argue to the trial court how he would use documents he had never seen.

The Department's position here is particularly ill taken since it was aware in advance that these documents were desired and had determined to deny them. After the conclusion of Sullivan's direct testimony when a general demand was made for production the Assistant United States Attorney said:

> "I think I know what he wants. He wants to proceed to lay a foundation for asking for the financial reports, I mean, how much Sullivan received" (tr. 334).

The government brief admits (p. 32) that had petitioner specifically requested the production of the Sullivan documents it had already prepared a schedule which it would offer as a substitute.[4]

The government argument, that because a defendant refused to surrender his rights under the statute and accept a substitute document (which he could not be assured contained the same information as the witnesses' statements (tr. 551)) he should lose all rights under the statute, is untenable.

2. *The documents "relate to" the direct testimony of the witnesses within the meaning of 18 U. S. C. Section 3500(b). The refusal to order their production was error.*

The term "relates to" as it appears in Section 3500(b) derives directly from this Court's opinion in *Jencks* and is intended to include a far broader area than the limited area of admissible evidence. In *Jencks* this Court pointed out that the criteria sufficient for production were much broader than the requirements for admissibility. The Court said (353 U. S. at p. 669):

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on

[4] We still do not understand why if as the government says, the substitute schedule contained all the information in the documents, the government did not produce the documents themselves.

> cross-examination, are established when the reports are shown to *relate to* the testimony of the witness." (emphasis supplied)

The adoption of this phrase by the legislature demonstrates a legislative intent to adopt the judicial construction of that phrase.[5]

Plainly, the withheld statements "relate to" the testimony of the witness. The government itself concedes (Government Brief, p. 33-34) that on the basis of those statements the defense might have been able to develop that petitioner's participation in Party activities was of so limited a nature as to indicate non membership. Having conceded that the withheld documents would be of use to the defense, the Department argues—as would every prosecutor—that this would be unavailing. This argument has already been answered by this Court in *Jencks*, 353 U. S. at pp. 669-669:

> "Because only the defense is adequately equipped to determine the effective use for purposes of discrediting the government witness and thereby furthering the accused's defense, the defense must be initially entitled to see them to determine what use may be made of them. Justice requires no less."

The Department of Justice is least equipped to estimate to what degree and with what effectiveness the defense might have used these documents. Only a new trial can test that.

The withheld statements also relate to the testimony of the witness in that they cast light upon his credibility by revealing him to be a paid informer for hire and the extent of his pecuniary commitment.[6] Two thousand years

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[5] The phrase is also used in Rule 26(b) of the Federal Rules of Civil Procedure. The scope of inquiry permitted by that rule is not limited by rules of admissibility at trial, but is far broader.

[6] There is also the possibility that the witnesses might be shown to have filched money from the government.

of history have established that witnesses who make a business of informing are unreliable, 3 Wigmore Section 969; Bowers, *Jefferson and the Bill of Rights*, 41 Virginia Law Review 709, 721; Donnelly: *Judicial Control of Informants*, 60 Yale Law Journal 1091, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1; *Jencks* v. *United States*, 353 U. S. 657; *Fisher* v. *United States*, (9 Cir., 1956), 231 Fed. 99; *Fletcher* v. *United States*, (D. C. Cir., 1946), 158 F. 2d 321; *Cratty* v. *United States*, (D. C. Cir., 1947), 163 F. 2d 844.

It is too late to argue here that matter which goes to the witness's credibility and does not directly contradict his testimony does not "relate to" his direct testimony. In *Rosenberg* v. *United States*, 360 U. S. 367, every member of the Court agreed that a statement was producible under Section 3500 although it did not contradict the direct testimony but merely impeached the credibility of a witness. The government argues that because Sullivan did not testify on direct examination that he was a paid informer, the withheld data did not relate to the direct testimony. When the Department of Justice placed Sullivan on the witness stand it placed his credibility in issue.[7] *Napue* v. *Illinois*, 360 U. S. 264, 269.

3. *The failure to order the production of the withheld statements was not "harmless error."*

Although the government uses the phrase "harmless error" to describe the rulings of the trial court it is not using the phrase in the customary fashion. The burden of the government's argument is not that the error which occurred was in fact harmless, but that the error hypothetically would have been or might have been harmless.

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[7] As we have argued in our principal brief (p. 10) the statute does not give the Department of Justice or the trial judge any discretion. Once producibility under the statute is shown, the documents must be produced. *A fortiori*, there is no discretion here where the documents plainly relate to the direct testimony.

The government argument is that the trial judge would not have (or might not have) permitted the use of the withheld material for cross-examination, ruling it cumulative. But the cross-examination might have been differently conducted had defendant's counsel been furnished with the documents. The trial judge might not have shortened such an examination.[8]

The Government's speculative conjectures do not meet the requirements of "harmless error" *Gordon* v. *United States,* 344 U. S. 414, 420.

The government also advances the argument that the failure to produce the statements was harmless error because, *if* petitioner had accepted the proffered schedule instead of the documents to which he was entitled, the trial court *could have* ruled that the documents were cumulative. Here again, the hypothetical possibilities posed by the government do not reach the level of "harmless error."

The trial judge could not say with any certainty that his error was a harmless one. As the Court of Appeals for the Second Circuit pointed out in *United States* v. *Zborowski* (2 Cir., 1961) 271 F. 2d 661, 667.

> "No one can ever say in a particular case just what bit of evidence may turn the tide one way or the other. In every case where a jury has rendered a conviction and where other impeaching evidence is available, it could be argued that the grand jury evidence was merely cumulative. But of course the point in allowing full and free cross-examination is to permit this very cumulation of evidence. So long as evidence of this nature is relevant it ought to be freely available to a defendant for whatever use he may wish to make of it."

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[8] We read the trial court's ruling (tr. 506-509) foreclosing examination on Sullivan's reports, as acceptance of the government's position at trial, that the defense could not inquire into the existence of producible statements other than those the government had already furnished.

In any event, under no view of the law could petitioner have been compelled to accept the schedule in exchange for his rights to the documents themselves since the schedule did not include all the information contained in the documents. The government cannot make petitioner's valid refusal to surrender his rights into an excuse for the destruction of those rights.

At the heart of the government's "harmless error" argument is a confusion between the requirements for production and the considerations governing admissibility. The government is attempting to limit producible documents to those which are clearly admissible. Because a document may not be admissible does not mean that a defendant is not entitled to its production. The contrary is the case. Nothing in the statute indicates an intent to change the ruling of this Court in *Jencks* and *Gordon* v. *United States*, 344, U. S. 414, that the material to be produced need not be absolutely admissible. The use of the broad term "relates to" indicates a congressional intent to preserve the effect of these rulings[7]

The distinction between productibility and admissibility is an important one. A document may not be admissible and yet lead discovery of acts or new approaches to trial which may change the result of the case. Had defense counsel been properly furnished with these documents they might well have served a discovery function and led the petitioner's counsel to open further the defense which even the government concedes to be a possible one (Government Brief, pp. 34-35), that petitioner's absence from Party affairs indicated non-membership in the Party.

The argument of the government, opens the door to an evisceration of the statute. Prosecuting attorneys naturally tend to resist demands for production as oppressive, and to believe that the material sought cannot possibly help their opponent, or is inadmissible. Given the facts of human nature, if the government's argument is accepted here, the tendency of prosecutors to withhold producible documents (an act which is all the more pernicious because it is liable to go undetected) will be increased.

II. The erroneous instructions on membership and affiliation.

A. The confusion of the statuses of membership and affiliation.

The government squarely concedes (Government Brief, pp. 58-59) that the instruction that "affiliation • • • is equivalent or equal to membership in all but name" was error. This conceded error by the trial court must in and of itself vitiate the instructions on membership and affiliation and requires reversal. When the jury was erroneously instructed that affiliation was equivalent to membership, then by a necessary and immediate implication it was also erroneously instructed that membership was equivalent to affiliation. As we have shown in our principal brief and as the government now concedes the two statuses are separate and distinct. The instructions invited, if they did not require, the jury to return a finding of guilty on the membership count on the basis of evidence of affiliation (and the converse).

The conceded error permeated the instructions. On an operational level the two concepts of membership and affiliation were completely confused. Both were defined in terms of subjective attitudes only. The proof of both statuses was to be derived from the jurors' evaluation of the degree to which the defendant's political attitudes and acts evidenced sympathy with Communism (an evaluation which the jurors had perforce to make in terms of their own political attitudes). Even had the trial judge not made overt his erroneous equivalence of membership and affiliation, no jury, on the basis of his instructions (which were suggested by the Department of Justice) could have discriminated between the two statuses of membership and affiliation.

B. The trial court's subjective definitions of membership and affiliation destroy the constitutional rationale of the statute.

In *American Communications Association* v. *Douds*, 339 U. S. 382, this Court upheld the constitutionality of the forepart of the oath because, the Court held, it dealt with objective definable facts, formal subjection to the organizational discipline of the Communist Party or an affiliate, from which Congress might conclude a likelihood of engagement in political strikes. Only four members of this Court in *Douds* affirmed the constitutionality of an oath directed to a state of mind, even when that state of mind was belief in the overthrow of the government. Here, the state of mind involves no such closeness to engagement in political strikes. The translation which the government now proposes of the objective criteria of the oath as to membership and affiliation into subjective ones, therefore destroys the constitutional foundation which, this Court held, supported the oath.

The state of mind which the government would have the oath encompass is too remote from the danger foreseen by Congress to permit of a constitutional invasion. The oath then would neither relate to facts which, this Court has held, would sufficiently indicate a dangerous propensity nor to a state of mind which, this Court has held, to be an immediate premise to the forfended act, engagement in political strikes. By relying on the doctrine of guilt by association (association both with men and ideas), it would penalize free experimentation and inquiry in the area of political thought long before the threshold of any threat to an area with which the state has a right to concern itself.

Our legal tradition has long recognized that subjective attitudes are not reachable by the state until they approach the threshold of action, *e.g.*, the principle of *locus poenitentiae*. Ordinarily the law does not reach a state of mind

unaccompanied by objective facts. The law recognizes that between attitudes and action there is a vast gulf where ideas are tempered and preconceptions changed. This same premise must require any vital society to tolerate subjective attitudes and ideas (even though unpopular) which do not reach the threshold of action.[9] Otherwise the potential of benefit, either in the ideas themselves or in their interaction with other ideas, will be destroyed and growth and development limited thereby. As between a static and a dynamic society, the First Amendment chooses that ours shall be a society where mental attitudes are free.

The instructions below, particularly with reference to the "indicia" of membership, illustrate the dangers of any other approach. The illogic of the doctrines of parallelism and of the ascription to ideas of the result toward which the triers of fact feel (whether from preju-

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[9] Lord Macauley has pointed out a fallacy of any other position:

"It is altogether impossible to reason from the opinions which a man professes to his feelings and actions; and in fact no person is ever such a fool as to reason thus except when he wants a pretext for persecuting his neighbors. A Christian is commanded, under the strongest sanctions, to be just in all his dealings. Yet how many of the twenty four millions of professing Christians in these islands would any man in his senses lend a thousand pounds without security? A man who should act for one day, on the supposition that all the people about him were influenced by the religion which they professed, would find himself ruined before night; and no man ever does act on that supposition in any of the ordinary concerns of life, in borrowing, in lending, in buying, or in selling. But when any of our fellow creatures are to be oppressed the case is different. Then we represent these motives which we know to be so feeble for good, as omnipotent for evil. Then we lay to the charge of our victims all the vices and follies to which their doctrines, however remotely, seem to tend. We forget that the same weakness, the same laxity, the same disposition to prefer the present to the future, which make men worse than a good religion made them better than a bad one." *Civil Disabilities of the Jews*: 3 Macauley's Collected Essays 255, 263, *D. Appleton and Company, New and Revised Edition* (1878).

dice or otherwise) that they trend is inherent in any attempt to penalize a subjective attitude. Whether that attempt be characterized as a deprivation of freedom of speech or of due process of law, it is unconstitutional.

CONCLUSION

For the reasons set forth in this brief and our foregoing brief the proceeding should be dismissed. In the alternative, a new trial should be ordered.

Respectfully submitted,

M. Michael Essin,
623 North Second Street,
Milwaukee 3, Wisconsin,

David B. Rothstein,
188 West Randolph Street,
Chicago 1, Illinois,

Basil R. Pollitt,
52 Sidney Place,
Brooklyn 1, New York,

Attorneys for Petitioner.